

## APPENDIX

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. CATHERINE M WOODS

CASE NO. CR014065-001  
CR015397-001

DATE: June 22, 2020

STATE OF ARIZONA  
Plaintiff/Respondent,

vs.

FRANK JARVIS ATWOOD  
Defendant/Petitioner.

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**R U L I N G**

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**IN CHAMBERS RE: AMENDED PETITION FOR POST-CONVICTION RELIEF**

Pending before the Court is Petitioner's Amended Petition for Post-Conviction Relief for the above-referenced cases. The Court has carefully reviewed and considered the Petitioner's Amended Petition for Post-Conviction Relief, the State's Response, the Petitioner's Reply and supplemental materials, and relevant portions of the record. For reasons that follow, the Court finds that Petitioner raises no colorable grounds for relief, there is no legitimate basis to hold an evidentiary hearing on any of the claims raised in the Amended Petition for Post-Conviction Relief, and all of the claims shall be summarily denied under Arizona Rules of Criminal Procedure, Rule 32.1.

In evaluating Petitioner's Amended Petition, the Court has applied the current version of Rule 32, which became effective on January 1, 2020 by Order of the Arizona Supreme Court. *See* Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). As prescribed by the Arizona Supreme Court, the current version of Rule 32 applies to all cases pending on the effective date, unless the court determines that "applying the rule or amendment would be infeasible or work an injustice." *Id.* It is not infeasible, nor would it work an injustice, to apply the current version of Rule 32 to this case. Therefore, the Court finds that the current version of Rule 32 applies and controls. In reaching this conclusion, the Court notes that the claims and arguments presented in the Amended Petition, filed on January 13, 2020, bear no resemblance to the claims Petitioner originally asserted when he filed his successive Notice of Post-Conviction Relief on April 23, 2019.

After he exhausted all of his of-right appeals, and after the State and Federal Courts considered and

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rejected all of his prior efforts to overturn his conviction and sentence through two prior Rule 32 proceedings and a federal habeas corpus action, Petitioner now for the third time in this Court challenges his death sentence. He argues four separate grounds. The court finds that Petitioner has not stated a colorable claim for relief, he is not entitled to relief on any of the four grounds asserted, nor is he entitled to an evidentiary hearing on the matter.

For his first claim, Petitioner claims that the sentencing judge's finding of the A.R.S. § 13-703(F)(1) aggravating factor was legally erroneous, because the court at sentencing did not apply the "statutory elements test." The Court finds that this argument falls within the scope of Rule 32.1(a). The Court further finds that this argument is untimely and precluded. The argument was available to Petitioner on appeal following his sentencing. It was available during his first timely Rule 32 proceeding, which he filed in March 1993. The Court finds that this claim is precluded by Rule 32.2(a)(3) because it was available but waived in Petitioner's first Rule 32 proceeding, and no exception to preclusion applies. This claim is not the type that requires a defendant himself to make a knowing and voluntary waiver within the meaning of Rule 32.2(a)(3). The Court further finds that Petitioner has failed to provide sufficient reasons why this claim was not timely raised and why it should be considered now. Petitioner also failed to demonstrate that he raised this claim within a reasonable time of discovering a basis for it. The claim presents purely a legal issue, based upon statutory interpretation. There are no new arguments or material facts available now that were not available during his sentencing, appeal, and his prior efforts at Rule 32 post-conviction relief in this court.

In addition to preclusion under Rule 32.2(a)(3), the Court finds that this claim impliedly was considered and rejected by the Arizona Supreme Court during Petitioner's of-right appeal. The Arizona Supreme Court on appeal engaged in an independent review of the entire record and found that the State proved the (F)(1) aggravating factor beyond a reasonable doubt. Considering our State's developed case law on the issue of proving aggravating factors in capital cases, it is clear that the Arizona Supreme Court was acutely aware of the "statutory elements test," and that Court had regularly analyzed and applied the "statutory elements test" in the context of a separate and distinct aggravating factor under (F)(2). By implication, when the Arizona Supreme Court in this case did not apply the "statutory elements test" to determine whether the State proved the (F)(1) aggravating factor, the Supreme Court determined that the "statutory elements test" does not apply to the (F)(1) factor. For these reasons, this Court finds that Petitioner's claim of error concerning the "statutory elements test" is precluded by Rule 32.2(a)(2).

This Court also has assessed the legality of the sentence at the time it was imposed. The sentence as

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imposed was not erroneous or unauthorized. The Court finds that this claim raises no colorable issue under Rule 32.1(c), (d), or (h). It shall be summarily dismissed. There is no basis to hold an evidentiary hearing.

For his second claim, Petitioner claims that the California conviction that served as the basis for his (F)(1) aggravating factor is unconstitutional, because the California court failed to elicit a factual basis at a change of plea hearing. The Court finds that this claim falls within Rule 32.1(a). Similar to his first claim, this claim is untimely and precluded by Rule 32.2(a)(3). All of the facts and the law applicable to this claim were available to Petitioner at the time of his sentencing, appeal, and prior rule 32 post-conviction proceedings. The Court finds that this claim is precluded by Rule 32.2(a)(3) because it was available but waived in Petitioner's first Rule 32 proceeding, and no exception to preclusion applies. This claim is not the type that requires a defendant himself to make a knowing and voluntary waiver within the meaning of Rule 32.2(a)(3). The Court further finds that Petitioner has failed to provide sufficient reasons why this claim was not timely raised and why it should be considered now. Petitioner also failed to demonstrate that he raised this claim within a reasonable time of discovering a basis for it. There are no new arguments or material facts available now that were not available during his sentencing, appeal, and his prior efforts at Rule 32 post-conviction relief in this court.

In addition, aside from being untimely and precluded by Rule 32.2(a)(3), the claim lacks legal merit. The record in the California court easily overcomes any technical deficiency in the colloquy during the change of plea hearing. The record easily establishes a factual basis to support Petitioner's conviction in the California court. Of note, Petitioner has failed to present any suggestion or evidence that his conviction in the California court has been overturned or vacated. The conviction in the California court served as a valid aggravating factor under (F)(1).

The Court finds that this claim presents no colorable issue and it shall be summarily dismissed. There is no basis to hold an evidentiary hearing.

For his third claim for relief, Petitioner claims that no reasonable sentencer would have imposed death, based upon mitigation evidence that he has developed many years after his sentencing. The Court finds that this claim falls outside of the current version of Rule 32.1(h) and it presents no colorable claim for relief. The Court further finds that applying the current version of Rule 32.1(h) is feasible and it accomplishes justice. However, even if this claim was cognizable under Rule 32.1(h), the Court would find that this claim is untimely and precluded. Petitioner has failed to provide sufficient reasons why he did not timely raise the claim after discovering its basis. Claims for relief under Rule 32.1(h) have been available to convicted defendants since

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2000. The factual basis to support this claim of post-sentence mitigation evidence has been available to Petitioner since at least 2012. Petitioner has provided insufficient reasons as to why he waited for 8 years to bring this claim before the Court. Further, having considered Petitioner's proffered mitigation evidence, the Court finds that this evidence, when weighed against the other evidence of record in this case, falls exceedingly short of demonstrating by "clear and convincing evidence" that "no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752."

The Court finds that this claim presents no colorable issue and it shall be summarily dismissed. There is no basis to hold an evidentiary hearing.

For his fourth claim, Petitioner argues that his death sentence is unconstitutional because, 33 years after sentencing, it still has not been carried out. The Court finds that for more than 30 years, from the time of his sentence until the 2018 conclusion of his most recent post-conviction proceedings, Petitioner actively has been engaged in appeals, multiple Rule 32 proceedings in this court, and federal habeas corpus proceedings in the federal courts. Petitioner fails to present sufficient reasons why he did not raise this claim in his prior Rule 32 proceedings in 2009, when he already had been incarcerated on death row for 25 years. The Court finds that his claim is subject to preclusion under Rule 32.4 and rule 32.1(a)(3).

The Court also finds that Petitioner's fourth claim does not present a colorable issue under Rule 32.1(c). The sentence imposed was authorized and it was lawful. It did not violate any provision of the Constitution of the United States or the state of Arizona at the time it was imposed, nor does the passage of time now make the sentence unconstitutional or unlawful. In addition, the duration of his time on death row does not present a colorable issue under Rule 32.1(e). The length of time Petitioner has been on death row while pursuing post-conviction claims in the Courts is not a "newly discovered material fact" that would change his sentence, within the meaning of Rule 32.1(e).

Based upon the foregoing and good cause appearing, the Court has determined that no remaining claim presents a material issue of fact or law that would entitle Petitioner to relief under Rule 32.

**IT IS ORDERED** denying relief on all grounds raised in the petition, and summarily dismissing the Petition.

  
**HON. CATHERINE WOODS**

(ID: 0f8ef424-221c-4402-9b3e-2ee49ab381cc)

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**R U L I N G**

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Attorney General - Criminal - Tucson  
Case Management Services - Criminal  
Clerk of Court - Criminal Unit  
Clerk of Court - Under Advisement Clerk  
Ms. Lacey Stover Gard

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# Supreme Court

STATE OF ARIZONA

**ROBERT BRUTINEL**  
Chief Justice

ARIZONA STATE COURTS BUILDING  
1501 WEST WASHINGTON STREET, SUITE 402  
PHOENIX, ARIZONA 85007  
TELEPHONE: (602) 452-3396

**TRACIE K. LINDEMAN**  
Clerk of the Court

May 4, 2021

**RE: FRANK JARVIS ATWOOD v HON. WOODS/STATE**  
Arizona Supreme Court No. CR-20-0381-T/PC  
Court of Appeals, Division Two No. 2 CA-CR 20-0188 PRPC  
Pima County Superior Court No. CR015397  
Pima County Superior Court No. CR014065

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 4, 2021, in regard to the above-referenced cause:

**ORDERED: Petition for Review of Denial of Petition for Post-Conviction Relief = DENIED.**

**Justice Lopez and Justice Beene did not participate in the determination of this matter.**

Tracie K. Lindeman, Clerk

TO:

Lacey Stover Gard  
Natman Schaye  
Sam Kooistra  
Frank Jarvis Atwood, ADOC 062887, Arizona State Prison, Florence  
- Central Unit  
Jeffrey P Handler, Clerk  
Dale A Baich  
Amy Armstrong  
Michele Lawson  
tkl

**FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

MAY 27 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

FRANK JARVIS ATWOOD,

No. 22-70084

Petitioner,

v.

OPINION

DAVID SHINN, Director,

Respondent.

Application to File Second or Successive Petition  
Under 28 U.S.C. § 2254

Argued and Submitted May 24, 2022  
San Francisco, California

Before: M. Margaret McKeown, Consuelo M. Callahan, and Sandra S. Ikuta,  
Circuit Judges.

Per Curiam

On May 4, 2022, Petitioner Frank Jarvis Atwood filed a motion for an order authorizing the district court to consider a second or successive habeas petition as required by 28 U.S.C. § 2244(b)(3)(A). Atwood seeks leave to file a habeas petition raising three claims: (1) the use of his 1975 California conviction for lewd and lascivious conduct with a child under the age of fourteen years as an aggravating circumstance to qualify him for the death penalty violates the Eighth

and Fourteenth Amendments; (2) the State withheld material exculpatory evidence in violation of the Fourteenth Amendment and *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) he is actually innocent and his execution would violate the Eighth and Fourteenth Amendments. Because Atwood has failed to make a prima facie showing that his proposed petition meets the criteria set forth in 28 U.S.C. § 2244(b)(2)(B), the motion is denied.

## I

In 1985, Frank Jarvis Atwood was found guilty of kidnapping and first-degree felony murder and sentenced to death. On direct appeal, Atwood argued that his 1975 California conviction could not be used as an aggravating circumstance under section 13–703(F)(1) of the later-revised Arizona Revised Statutes. He also argued that use of section 13–703(F)(1) violated his Eighth Amendment rights (this is referred to as the “Eighth Amendment claim”). The Arizona Supreme Court rejected these claims and affirmed Atwood’s conviction and sentence. *State v. Atwood*, 832 P.2d 593 (1992). The U.S. Supreme Court denied certiorari. *Atwood v. Arizona*, 506 U.S. 1084 (1993).

In 1996, Atwood filed his first state habeas petition for post-conviction relief. The Arizona Superior Court denied relief on all claims. The Arizona Supreme Court denied review, and the U.S. Supreme Court denied certiorari.

Atwood filed his first habeas petition in federal district court in 1998. In

June 2005, the district court dismissed some of Atwood's claims on procedural grounds and in May 2007, it denied relief on the remaining claims but granted a certificate of appealability on the Eighth Amendment claim and one other claim.

In December 2007, Atwood filed his second state habeas petition to exhaust a law enforcement misconduct claim. Eventually, the law enforcement misconduct claim was denied by the Arizona Superior Court and the Arizona Supreme Court denied his petition for review. While this petition was pending, the State offered Atwood access to additional discovery. Atwood filed a motion for rehearing based on this new discovery, but the state trial court denied the motion and the Arizona Supreme Court again denied Atwood's petition for review.

Having exhausted his law enforcement misconduct claim in state court, Atwood returned to federal district court in January 2012 for a ruling on this claim. After permitting additional briefing, the district court dismissed the law enforcement misconduct claim. At this point, all of Atwood's federal habeas claims had been dismissed.

However, in light of the Supreme Court's March 2012 opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), the district court allowed Atwood to file a motion for reconsideration of its prior dismissal of his ineffective assistance of sentencing counsel claim as procedurally barred. In January 2014, after a four-day evidentiary hearing, the district court denied the motion for reconsideration. Consistent with a

revised certificate of appealability issued by the district court, Atwood filed a notice of appeal raising three claims, including the Eighth Amendment claim.

In September 2017, we affirmed the denial of Atwood’s petition for a writ of habeas corpus. *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017). We held, *inter alia*, that “the state court could reasonably have concluded that section 13–703(F)(1) meets the requirements set forth in *Furman* and *Gregg* for guiding a sentencing body’s decision as to death eligibility.” *Id.* at 1049 (citing *Furman v. Georgia*, 408 U.S. 238 (1973), and *Gregg v. Georgia*, 428 U.S. 153 (1976)). The Supreme Court denied Atwood’s motion to file a petition for certiorari out of time. *Atwood v. Ryan*, 139 S. Ct. 298 (2018).

In April 2019, Atwood initiated a third post-conviction proceeding in the Arizona Superior Court raising several sentencing claims, including an allegation that the (F)(1) aggravating circumstance was constitutionally infirm. The Arizona Superior Court denied relief in June 2020, and the Arizona Supreme Court denied review in May 2021.

In June 2021, Atwood filed another successive post-conviction notice in the Arizona Superior Court relating to some of the physical evidence against him. Counsel was appointed and a petition was filed in November 2021. The petition was denied in February 2022.

On May 3, 2022, the Arizona Supreme Court issued a warrant scheduling

Atwood's execution for June 8, 2022.

## II

### A

We have jurisdiction to consider the motion pursuant to 28 U.S.C. § 2244(b)(3)(B) (“A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.”). Subsection (C) states that we may authorize the filing of a successive application only if we determine “that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” *Id.* § 2244(b)(3)(C).

Section 2244(b)(2) states that a new claim asserted in a second or successive habeas corpus application under § 2254 “shall be dismissed” unless one of two criteria are met. First, the applicant may show that the claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” Atwood's motion does not invoke this ground. Alternatively, the applicant may show that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” **and** the alleged facts, if proven and viewed in the light of all the evidence, “would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying

offense.”

## B

Atwood admits that he is seeking to file a successive petition and that such a petition is “generally subject to the provisions of § 2244(b).” But Atwood asserts that the requirements of § 2244(b)(2)(B) are not applicable to a claim of innocence of the death penalty. Therefore, he does not argue that his first claim, regarding his 1975 California conviction, meets the requirements of § 2244(b)(2)(B). Instead, he argues that his first claim ought to be excused from satisfying § 2244(b)(2)(B)’s requirements under the equitable exception for claims of actual innocence of the death penalty recognized by the Supreme Court in *Sawyer v. Whitley*, 505 U.S. 333 (1992).

We disagree because this argument is foreclosed by our decision in *Thompson v. Calderon*, 151 F.3d 918, 923–24 (9th Cir. 1998) (en banc), *as amended* (July 13, 1998), which recognized that the *Sawyer* exception was subsumed, with respect to § 2244(b)(2), by the amendments to that provision enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA). Consequently, we assess all of Atwood’s new claims against the criteria set out in § 2244(b)(2)(B). Because *Sawyer* provides no equitable exception to § 2244(b)(2)(B)’s requirements, and because Atwood does not assert that his first claim otherwise meets those requirements, Atwood’s first claim does not make a

prima facie showing that it meets the requirements for an exception to the bar on second or successive petitions. *See* § 2244(b)(3)(C).

Even if we considered whether Atwood’s claim could meet the requirements of § 2244(b)(2)(B) (despite his lack of argument on this point), we conclude that it could not. Section 2244(b)(2)(B) requires that the “factual predicate for the claim could not have been discovered previously through the exercise of due diligence,” § 2244(b)(2)(B)(i), and that the “facts underlying the claim, if proven and viewed in light of the evidence as a whole,” would establish his innocence by clear and convincing evidence. § 2244(b)(2)(B)(ii). Because Atwood’s first claim is not based on facts or a factual predicate, this language is inapplicable by its terms.

And even if we read § 2244(b)(2)(B)(i) as permitting an applicant to show that the *legal* “predicate for the claim could not have been discovered previously through the exercise of due diligence,” Atwood has not shown that he acted diligently in pursuing his first claim. His California conviction was the sole aggravating circumstance rendering him eligible for the death penalty, and Atwood has challenged it from the very beginning. *See Atwood*, 832 P.2d at 664 (Atwood “argues that his 1975 conviction cannot be used to establish a § 13–703(F)(1) aggravating circumstance”). The constitutional challenge to the use of the California conviction that was rejected by the Arizona Supreme Court in 1992 is arguably different from the constitutional challenge he now asserts, but his counsel

at oral argument on the motion admitted that the claim, as now phrased, could have been raised earlier. Atwood has failed to point to any intervening change in law or fact to excuse this default. The first claim presented by Atwood's proposed petition does not meet the diligence requirement of § 2244(b)(2)(B)(i), even assuming that prong addressed legal predicates.

### C

Atwood's *Brady* claim also fails to meet the requirements of § 2244(b)(2)(B). Atwood contends that in the summer of 2021, during an inspection of the Arizona Attorney General's case file, his counsel "discovered a memorandum written by an FBI Special Agent on September 19, 1984 (i.e., two days after the disappearance, and before police had identified and arrested Mr. Atwood as a suspect) noting that the Phoenix Police Department had received an anonymous phone call from a woman who reported seeing Vicki Lynn[e] Hoskinson in a vehicle with Arizona license plate 3AM618." Atwood further represents that the referenced vehicle was not his car but belonged to Annette Fries's next-door neighbor. He argues that it is likely "that Fries or her son called in the tip, and used a convenient known license plate number that was not theirs in an attempt to either exact revenge against a neighbor or throw police off their trail."

Atwood's *Brady* claim does not meet the standard in § 2244(b)(2)(B)(ii)

because he has not made a prima facie showing that the unreported anonymous phone call, “if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found” him guilty.

In light of all the information Atwood had concerning Fries at the time of his trial, it is unlikely that the disclosure of the anonymous phone call would have changed anything. The State alleged, and Atwood does not deny, that at the time of trial Atwood had information that:

(1) witnesses reported seeing V.L.H. at a local mall in the company of a woman matching Fries’s description; (2) Fries “gave shifting information about her whereabouts at the time of the disappearance”; (3) Fries had been charged with crimes related to her attempt to burn down her trailer, but was found incompetent to stand trial; (4) a woman matching Fries’s description was seen “in the days surrounding the disappearance driving a car very similar to Mr. Atwood’s”; (5) witnesses described seeing a woman matching Fries’s description attempt “to kidnap other children in the days surrounding the disappearance”; and (6) a defense witness “had experienced intimidation and harassment . . . as potential revenge for her testimony on Mr. Atwood’s behalf.”

As all of this did not sway the jury, it is unlikely that the anonymous phone call would have made a difference, even after it was determined that the reported license plate belonged to Fries’s neighbor.

Moreover, § 2422(b)(2)(B)(ii) requires that the new material be considered “in light of the evidence as a whole.” Here, the Arizona Supreme Court in 1992

noted:

Although we cannot know from the facts presented at trial exactly what happened to the victim when she was taken to the desert, we do know that (1) defendant, a convicted pedophile, was seen within yards of the girl literally seconds before she vanished; (2) witnesses identified defendant as the man they saw driving with a young child in his car; (3) defendant was seen later that afternoon with blood on his hands and clothing; and (4) defendant was also seen with cactus needles in his arms and legs.

*Atwood*, 832 P.2d at 616. We cannot conclude that the disclosure of the unreported anonymous phone call would have had any effect on Atwood's trial and conviction.

## D

Finally, Atwood has not made a prima facie showing in support of his freestanding actual innocence claim. The claim asserts that the *Brady* material is new evidence showing that Atwood is not guilty of the underlying offense. But as we explained above, the unreported anonymous phone call does not approach demonstrating, by "clear and convincing evidence," that Atwood is not guilty. The phone call is not evidence that Atwood did not commit the murder, or that someone else committed the murder. Rather, Atwood supposes that the phone call was made by Fries or her son with the intent of leading the investigators away from Fries. Even if this were true and Atwood could prove it, it still would not be clear and convincing evidence that Atwood was innocent.

### III

Because Atwood has not made a prima facie showing that his proposed petition meets the criteria set forth in 28 U.S.C. § 2244(b)(2)(B), the motion for an order authorizing the district court to consider a second or successive habeas petition is **DENIED**.